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THE EFFECT WHEN AN INTERESTED MEMBER OF A BOARD OF ALDERMEN VOTES FOR THE PASSAGE OF AN ORDINANCE.

An interesting question is presented in the above subject, particularly when there is a statute or an ordinance prohibiting interested members from voting, whether they be aldermen, trustees, or directors in a corporation.

In fact, upon the general principles of equity it would seem to be well established by the best authority that even though there be no ordinance or statute or by-law prohibiting interested members of the boards of managers of either public, quasi public, or private corporations in voting for the passage of an ordinance or resolution wherein one or more of such board is interested, directly or indirectly. Yet such an ordinance or resolution is void.

These questions arise most frequently when a contract is proposed whereby a purchase of property is sought for the corporation in which the member of the board has a pecuniary interest.

A case which ably presents all the features of the subject under consideration, is that of Stroud v. Consumers' Water Company, 56 N. J. Law, 422, which relates to an ordinance passed by the common council of Atlantic City, providing for the purchase of the property and franchise of the Consumers' Water Company, payable in the bonds of the city, and another similar ordinance for the purchase of the franchise of the Atlantic City Water Works Company. The objection was made that the ordinances were illegal, because four of the members of the common council who voted for them were stockholders in the Consumers' Water Company. The point made was that the common council was the agent of Atlantic City in making these purchases, and that four of its members were adversely interested as part owners of the property of the Consumers' Water Company; and that the ordinance is voidable at the instance of the city or a taxpayer of the city. Judge Reed, delivering the opinion of the court, said: "It is a fundamental rule applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase can he be himself the seller. The expediency and justice of this rule are too obvious to require explanation. Durr Agency (Paley), page 33."

This doctrine is applicable whenever the fiduciary situation of contracts or condition of agency exists, and is enforced, whether the agency is public, quasi public, or private. "It is well settled," says Mr. Beach, "that directors or managers of corporations and other companies are equally within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust* and agent and his principal; directors and managers being, in fact, trustees and agents of the bodies represented by them." 1 Beach Corp., sec. 240. Again in Section 242, he says: "Directors are disqualified from acting in the right and behalf of themselves, and of their companies at the same time; and transactions with themselves, or wherein they are interested, are voidable, either by the company or by its stockholders, or by its creditors." A director of a corporation cannot make for himself or for his own benefit a contract which will bind the company, and such a contract may be repudiated by the company at the instance of a

stockholder. Guild, Executor, v. Parker, Receiver, 14 Vroom, 440.

In the case of Stewart v. The Lehigh Valley Railroad Co., 9 Vroom, 505, Mr. Justice Dixon speaking for the court, said: "The vice which inheres in the judgment of a judge of his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui qui trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall, and it matters not if the contract seems a fair one. Again, this learned judge remarks: 'The application of this rule is most frequent in relations between vendor and purchaser, but its reason and force extend to *all* agents and trustees, public and private. * * * The strongest intellects have enunciated the rule with its utmost vigor, and in its broadest sense.'" Referring to the section which applied to the disqualification of councilmen pecuniarily interested in the passage of an ordinance, Judge Reed says: "This language, with equal clearness, includes the contract now in question. Four of the members of the common council of Atlantic City were interested in furnishing the property of the Consumers' Water Company, to the city, the expense or consideration of which is paid by the council, of which these four members are a part. The invalidity of the contract rests upon the doctrine that a contract is illegal, if it be opposed to the general policy and intent of the statute. Meliss v. Shirly, L. R. 26 Q. B. D. 446; Milford Borough v. Milford Water Co., 124 Pa. St. 610; State, Gregory Taylor v. Jersey City, 5 Vroom, 390. I regard this case directly ruled by the last case cited. The statute under which that decision was made is similar to the one already mentioned. Two of the members of the common council of Jersey City, in that case, were interested in the property purchased; in this case four. The condition existing in that case exists in this." The reasons for the rule are all so well stated by Judge Reed, in the above, that we will confine further comment to short applicable passages from other authorities.

In Pennsylvania, after quoting the law forbidding members to be interested in contracts with the corporation, the court, in the case of Milford Borough v. Milford Water Company, 124 Pa. St. 610, said: "It is almost needless to say that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing."

Says McQuillin, in his work on Municipal Ordinances, section 108: "The fact that the vote of the interested member is not necessary to pass an ordinance seems to be immaterial. Thus in a New Jersey case, a member of the board of public works voted for an ordinance authorizing a railroad company, in which he was a stockholder, to lay its tracks in the streets, and the ordinance was held voidable. It appeared that there was no necessity for the action of the interested member, for there were others who could act without him." The court said: "The fact that there were a sufficient number of votes, apart from his vote, to pass the ordinance, is no answer to the objection taken upon this point. The infection of the concurrence of the interested persons spreads so that the action of the whole body is voidable." That is to say, that the interest of one person may have been exerted to influence the whole body.

All the above goes to show that even were there no provision by statute or city ordinance, the same rule would apply as to the validity of an ordinance, where one of a board of aldermen had a pecuniary interest in the contract about which such ordinance related, for it is true, as Mr. Abbott says in his recent work on Municipal Corporations, vol. 2, page 1458, that: "In our form of government public offices are a public trust."

This being true, the strictest rules of trusteeship should apply to all matters of the character of those under consideration herein where a public trust is concerned.

NOTES OF IMPORTANT DECISIONS

LIMITATIONS—IMPLIED OR RESULTANT TRUSTS.—Under the statute in Missouri relating to married women, where a husband receives money belonging to his wife without her consent in writing, it remains hers, and he holds it as her trustee. Smith v. Settle (Mo.), 107 S. W. Rep. 430, is a case based on that statute arising on the following facts:

"Defendant's wife in her lifetime inherited the sum of $1,131.50. Defendant received the money in May, 1890, and he used it as his own, but he never had the written consent of his wife. The wife died intestate in July, 1904, and plaintiff was appointed administrator of her estate, and began this action in October, 1905. Among other things, the petition alleges that, after the death of his wife, defendant concealed from the heirs the facts concerning said moneys for the purpose of preventing them from collecting. The answer was a general denial and a plea of the statute of limitations. The judgment in the trial court was for the plaintiff."

The defense rested on the statute of limitations, the suit not having been brought within one year after the death of the wife. The plaintiff contended that the fund, being a trust fund, the statute did not run. On this branch of the case the court says:

"When the defendant received the money belonging to his wife without her consent in writing, it remained hers, and he held it in trust for her. The period of limitation began to run the day he received the money. But, as she was under coverture and died under that disability, another statute applied to such case (sections 4279, 4281, Rev. St. 1899 [Ann. St. 1906, pp. 2354, 2355]), which gave her representative one year from her death. The latter section reads that: 'If any person so entitled to sue die, before the expiration of the time herein limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time and within one year after such death, commence such action, but not after that period.' Under this section it is imperative that the action be begun within one year." Citing Rosenberger v. Mallenson, 92 Mo. App. 27, Reed v. Painter, 145 Mo. 341, 46 S. W. Rep. 1089. Continuing, the court says, respecting the application of limitations to trusts:

"But it is said by plaintiff that defendant became a trustee for the deceased wife, and that limitation does not run in such case, and that the statute aforesaid requiring suit to be brought within one year after death does not apply. It is true where the husband appropriates the wife's money inheritance, as here, she can treat him either as a trustee, or simply as a debtor. Winn v. Riley, 151 Mo. 61, 67, 52 S. W. Rep. 27, 74 Am. St Rep. 517. But, if treated as a trustee, it is not such a trust as is exempt from the operation of the statute of limitations. It was not an express trust. It was an implied or constructive trust, and the statute runs against such from its creation. Landis v. Saxton, 105 Mo. 486, 16 S. W. Rep. 912, 24 Am. St. Rep. 403; Reed v. Painter, 145 Mo. 341, 356, 46 S. W. Rep. 1089."

The statutes of Missouri are very liberal toward married women, and the decisions have, in the main, given full force to such statutes. The statement as to the rule that the statute runs against implied or constructive trusts is supported by authority, with certain qualifications, as in cases of fraudulent concealment.

ELECTRICITY—INJURIES INCIDENT TO PRODUCTION AND CARE REQUIRED.—It is held in Cutler v. Putman Light & Power Company (Conn.), 68 Atl. Rep. 1006, that the ordinary care required by law calls for the use of very great care in the construction and maintenance of wires for conducting a high voltage of the electricity. In this case defendant maintained its wires directly over the poles and wires of a street railway company. The decedent was a lineman in the employ of the railway company and in the course of his employment climbed a pole to bore a hole in it near the eye bolt. He had no knowledge that the defendant's wire was not properly insulated. While so engaged in his duties, and by reason of the poor insulation, he received a shock from which he died in a few minutes. As to the care required in the control of the electricity, the court says:

"The exercise of that degree of care which the law terms 'ordinary care' required the use of very great care by the defendant in the construction, maintenance, and operation of its appliances for conducting its currents of electricity of high voltage. McAdam v. Central Railway and Electric Co., 67 Conn. 445-447, 35 Atl. Rep. 341. In determining what precautions it should take against danger to human life by possible contact with its highly charged wires, it was bound to recognize the right of the railway company to maintain and use its poles and wires, and to consider the fact that the railway company's linemen were required in the performance of their duties to climb these poles for the purpose of maintaining and repairing the railway company's wires. Nelson v. Branford L. & W. Co., 75 Conn. 548-551, 54 Atl. Rep. 303. The defendant knowingly allowed its highly charged wire, the current

from which caused Cutler's death, to hang so near to the pole upon which Cutler was working, and to span the wire of the railway company attached to it, that the railway linemen while working upon the pole were liable to accidentally come in contact with it. The defendant learned some weeks before the accident that one of these two sagging wires had come in contact with the span wire at this pole and that either from the insufficiency of these such a breaker ball as that used upon the span wire, or from its defective condition, it did not furnish an insulation against the current from the defendant's wire, and that the span wire became grounded when in contact with the defendant's wire. The trial court has pointed out how the danger of such contact with these wires by linemen might have been removed or lessened by the defendant. The trial court was justified in concluding that a proper construction or maintenance of the defendant's wires at this point had not been shown."

LIABILITY OF STOCKHOLDERS TO CREDITORS OF A MISSOURI CORPORATION UPON UNPAID STOCK.

It is proposed to discuss herein the various questions that have arisen in the Missouri courts by reason of the attempts of creditors of corporations to compel the holders of unpaid stock in such corporations to satisfy their claims. Persons dealing with a corporation have a right to assume unless there is something to show the contrary that the full amount of its issued capital stock has been actually paid to the corporation either in money or its equivalent so that it may be reached in satisfaction of the corporation's debts. The courts will, at the instance of the creditors, compel full payment of the stock of a corporation if such payment is necessary for the satisfaction of their claims and in doing so will disregard any agreement between the corporation and the stockholders under which stock is issued as full paid upon payment of less than its par value in money or property.

This rule of law was formerly based upon what has become known as the trust fund doctrine; but it is now generally recognized that the only sound theory upon which the stockholder can be held is fraud. The payment of less than the full amount of the capital is a fraud upon the creditor who gives credit to the corporation on the supposition that its represented capital has been paid in and the courts in requiring the stockholder to make up the difference between the actual capital and the represented capital for the purpose of satisfying creditors is only applying familiar principles of equity.

Obviously the first inquiry to be made by the judgment creditor who is desirous of collecting his judgment against an insolvent corporation from its stockholders is to determine whether the capital stock has been paid in full. If it has been so paid then in this state no recovery can be had from the stockholders. In some jurisdictions there is, as there was formerly in Missouri, a statutory liability distinct from the common law liability which, under certain circumstances, rendered the stockholder liable for the debts of the corporation regardless of whether or not the stock had been paid for in full. Such statutory liability, for example, is imposed at the present time by the National Banking Act upon stockholders of national banks who are required to respond to the claim of creditors to the extent of twice the par value of the stock held by them.

The law in this state is very favorable to the creditor upon the question of what constitutes payment of a corporation's capital. In fact, the rule here is not only more stringent than in most jurisdictions but it is so firmly established by repeated decisions that any attempt to have it modified has been found to be unsuccessful. Section 8 of Article 12 of the Missouri Constitution provides: "that no corporation shall issue stock or bonds excepting for money paid, labor done and property actually received." This provision has been re-enforced by legislative enactment to the same effect, namely Section 962 R. S. 1899.

Referring to the above and similar constitutional and statutory provisions, Mr. Cook in his excellent work on Corporations at section 47 has this to say by way of criticism:

"It is now thirty years since the first of these provisions was enacted, and yet it may be said that these constitutional provisions have decidedly failed to remedy the evil which they were expected to cure. They are so sweeping in their effects and so disastrous to innocent holders of corporate securities that the courts are reluctant to declare void the stock and bonds which have passed into bona fide hands. There is but one state in the Union which has succeeded in eliminating most of the evils of stockwatering. That state is the commonwealth of Massachusetts. The remedy there is a prohibition against the issue of any stock or bonds for property until after commissioners have passed upon the proposed issue. That state does not wait until the stock and bonds have been issued and either sold or used as collateral security. The remedy is applied in the origin of the transaction and has been found to be effective as well as just. There are few Massachusetts cases in this chapter—a proof of the justice and efficacy of the Massachu-

setts remedy. On the other hand, the flood of litigation in the courts of Alabama, Missouri, and the other states, on this subject is similar proof of the injustice and failure of the policy of repudiation. Moreover the bewildering currents of conflicting decisions, even in those states where the most earnest efforts are made to enforce the constitutional provisions, leave the investor on an unknown sea, without chart, compass, landmark or pilot. Even in Alabama and Missouri, the courts feel obliged to construe this constitutional provision in such a way as to protect the equities of innocent stockholders."

It is not proposed to discuss the issue between the learned author and the Supreme Court of Missouri as to whether the constitutional provisions have been effective in other states. An elaborate discussion of the authorities from which it is concluded that they have proven effective is to be found in Van Cleave v. Berkey,[1] and Clayton Land Co. v. Birmingham Co.[2] It will not be denied that they have been effective in Missouri.

The collection of Missouri authorities is here attempted rather to meet the criticism that "the bewildering currents of conflicting decisions, even in those states where the most earnest efforts are made to enforce the constitutional provisions leave the investor on an unknown sea, without chart, compass, landmark or pilot" and to show that the decisions in Missouri furnish the investor with clear chart and landmarks by which to determine his liability.[3]

(1) 143 Mo. 109.

(2) 92 Ala. 423.

(3) Of Missouri decisions as to what constitutes payment for capital stock there are many. But as they all enforce the same rule the statement of the law in the leading case of Van Cleave v. Berkey, 143 Mo. 133, will be sufficient, viz.: "Upon a review of all the cases decided by the appellate courts of this state since the adoption of the constitution of 1875, the ruling in all of which will be found to be in harmony, it is impossible to escape the conviction that in this state, whatever may be the case in some of the other states, the American Trust Doctrine, as suggested by Mr. Justice Harlan, has indeed been 'reinforced' by its constitution and statutes; and that the proposition that the stock of a corporation must be paid for in meal or in malt, in money or in money's value, is not a mere figure of speech, but really has the significance of its terms. It may be paid for in property, but in such case the property must be the equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money or its equivalent in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital has been so paid and that the money or its equivalent in property will be forthcoming to respond to its legitimate demands. In short that it is the duty of the stockholder, and not of the creditor, to see that it is so paid; hence the inquiry in a case between the creditor and a stockholder, when property has been paid in for the capital stock of a corporation, is not whether the stockholder believed or had reason to believe that the property was equal in value to the par value of the capital stock, but whether in point of fact it was such equivalent."

(4) 131 Mo. 620.

(5) Van Cleave v. Berkey, 143 Mo. l. c. 135.

(6) 90 Mo. App. 569.

Briefly stated the rule in this state is that the capital stock of a corporation is paid up only where the property, labor or services for which the stock is issued has an actual value equal to the price for which it is transferred to the corporation or the par value of the shares for which it is exchanged and that this actual value is to be determined by the judge or jury from evidence submitted as in any case where value is to be determined; that no fraudulent or intentional over-valuation need be shown; and the fact that the stockholders reasonably and honestly believed that the property was worth what the corporation paid for it does not relieve them from liability if the court finds that their valuation was an excessive one. In this respect the law in this state differs from the rule that prevails in almost every other jurisdiction since the valuation put on the property by the stockholders is generally upheld unless such valuation is shown to have been fraudulent. By fraudulent, however, is not meant in most jurisdictions actual fraud but an intentional overvaluation which the courts hold to be legal fraud in this class of cases. Our supreme court leaned at one time strongly to this rule but that doctrine advanced in the case of Woolfolk v. January,[4] was firmly repudiated and has since received no consideration from our courts.[5]

In this connection it is interesting to note that in the case of McClure v. Paducah Iron Co.,[6] decided in 1901, by the St. Louis Court of Appeals, the court in a suit against a stockholder of a Kentucky corporation held that as there was no rule in Kentucky on the subject they would lay down a rule for the payment of capital stock based upon sound principle and not necessarily that established by the decisions of this state. After an examination of the different rules and authorities in different states, the court concluded that the soundest rule was not that established in this state, but the one which prevailed in most jurisdictions and which made the good faith in making the valuation the test as to whether it should be sustained by the court. The case contains a discussion of the various rules of law which determine whether stock paid for

in property has been full paid. While the result of the decision can not be questioned since the court found that even under the liberal rule which it adopts that the stock was not paid for, yet it would seem to be open to criticism on the ground that the intermediate courts of this state in determining what the correct rule of law is should follow the decisions of our supreme court on that subject rather than those of other jurisdictions.

In the case of Van Cleave v. Berkey,[7] all the decisions of our courts up to that time (1897) on the question of how capital stock must be paid are stated and discussed.[8]

An examination of the decisions in this state shows conclusively that upon the principal question as to how the capital stock of a corporation must be paid up there has been no current of conflicting decisions but that excepting the deviation in Woolfolk v. January, which was afterwards repudiated, the courts of this state have uniformly and consistently laid down and enforced one rule as a guide to the liability of stockholders and investors.

When it has been established that the capital stock has not been paid up, a variety of questions arise as to what stockholders are liable to the creditor and under what circumstances the liability can be avoided. These questions are usually presented by stockholders as matters of defense and we shall discuss them with a view to determining whether the law relating thereto is settled or is open to the criticism above mentioned.

In general it should be said that the creditor must before proceeding against the stockholder, obtain a judgment against the corporation and have execution issued thereon which is returned unsatisfied. It has been held, however, that a nulla bona return is not necessary in every case, but that it may be dispensed with if it is shown by any competent evidence that the corporation has no goods on which levy can be made.[9]

The first defense to be considered is that the defendant was not the owner of the stock at the time when liability thereon to the creditor became fixed. Suppose unpaid stock is held by A at the time the debt of the corporation was contracted, transferred to and held by B when the debt matured, by C at the time judgment was obtained by the creditor against the corporation, by D at the time of the nulla bona return thereon and by E at the time the proceeding against the stockholder was instituted. If each separate transfer was bona fide and each party knew that the stock was unpaid, which stockholder can the creditor hold? He can recover against D alone, since it is a settled fact in this state that the stockholder who holds stock at the time of the return of the execution against the corporation is the stockholder who is liable to the creditors for unpaid stock. In Skrainka v. Allen, 76 Mo. 384, which was a proceeding against the stockholder by motion the defendant made the defense that he was liable only for such shares as he held at the time the motion for execution against him was filed. The court, however, decided that defendant was liable as a stockholder on all unpaid stock which he held at the time the execution against the corporation was returned unsatisfied. The decision was based upon the interpretation of the statute giving the creditor the right to proceed by motion and upon the decisions under the English Act which contains similar terms to our statutory provision.

This case was followed in Coquard v. Pendergrast, [10] where one of the defenses was that at the time of the filing of the motion the corporation was indebted to the defendant stockholder in an amount in excess of the amount unpaid on his stock. The court held this defense was not good because the liability of the stockholder became fixed as of date of the return of the execution against the corporation and the defense that the corporation was indebted to the defendant stockholder to be valid must show such indebtedness at that date, not at the later date, when the motion was filed. The court after referring to Skrainka v. Allen said at page 242: "We regard this decision as establishing the principle which must govern the present case. If, from date of the return nulla bona on the creditor's execution against the corporation, the stockholder ceases to have power to cast off his liability by transferring his stock, he must by parity of reasoning cease to have power to cast it off in any other way. It is important that the date at which the liability of the stockholder to the creditor of the corporation becomes fixed, shall be established by a rule uniform in its operation and we regard the decision of the supreme court in Skrainka v. Allen, supra, as establishing for all purposes the rule that such date is the date of the return of the execution against the corporation, nulla bona."

It being established that the stockholders' lia-

(7) 143 Mo. 135.

(8) The following comprise the decisions found since that date: Meyer v. Mining & Milling Co., 192 Mo. 189; Berry v. Rood, 168 Mo. 318; Chrisman-Sawyer Co. v. Independence Mfg. Co., 168 Mo. 634 (1901); Shields v. Hobart, 172 Mo. 491; Rumsey Mfg. Co. v. Kaime, 173 Mo. 551 (1902); Trust Co. v. McMillan 188 Mo. 548 (1905); State v. Hogan, 163 Mo. 43 (1901); Bank v. Rockefeller, 195 Mo. 17 (1905); Webb v. Rockefeller, 195 Mo. 58 (1905); McClure v. Paducah Iron Co., 90 Mo. App. 568 (1901); Anheuser-Busch Brewing Assn. v. Park Novelty Co., 120 Mo. App. 513 (1906).

(9) Marks v. Hardy, 14 Mo. App. 595.

(10) 35 Mo. App. 237.

bility is fixed on the date of the return of the execution, the question then arises when can that liability be done away with or shifted by a transfer of stock prior thereto. The inquiry is a two-fold one, viz.: when is the transferor liable and when is the liability fastened upon the transferee. As to the transferor, the rule may be broadly stated to be that where a transfer of the stock is made prior to the date of the return of the execution and in good faith, the transferor is not liable for the unpaid portion of the stock. What constitutes good faith must, of course, be determined by the facts of the case. It has been held that the fact that the transferee was insolvent does not make the transferor liable if he did not know of the insolvency. In Miller v. Ins. Co.,[11] it was said: "If before any execution be issued the stockholder shall have honestly and without any intention to defeat the creditors of the company, sold and transferred his stock, the mere fact that the purchaser was insolvent at the time is not sufficient to hold such stockholder still liable for the debts. The question in such case is whether the transfer was fraudulent and void as to the creditors of the company. If the stockholder knew of the insolvency at the time of the transfer it would be very strong evidence of fraud and it would be hard to resist the conclusion that such transfer was made in bad faith. In this case there is no evidence that the stockholder has any knowledge that Whiteside was insolvent when he sold his stock." It has been held also that a transfer made to the transferor's wife who was not pecuniarily responsible but without any intention of defrauding the creditors and at a time when the corporation was prosperous, will not be held invalid so as to make the transferor liable.[12]

The converse of the rule above laid down is true namely, that when the transfer or sale is not made in good faith, the transferor remains liable to the creditors. And the dictum above quoted from Miller v. Ins. Co.,[13] where the court said that knowledge of the transferee's insolvency was sufficient evidence of bad faith, was applied in Gottchalk v. Storer,[14] in which case the defendant knew not only that the transferee was not financially able to respond to creditors' claims for the unpaid portion of the stock but also knew at the time of the transfer that the corporation was in failing circumstances. In Provident Savings Trust Co. v. Jackson, etc.,[15] the stockholder was held liable after he had transferred his stock, since it appeared not only that at the time of the transfer the corporation was hopelessly insolvent, but that the transfer was made for a nominal consideration to one whom the evidence strongly tended to show was insolvent. See also McClaren v. Franciscus.[16] Since the intent to defraud creditors by escaping liability is the essential element, either the known insolvency of the corporation or the inability of the transferee to respond for any reason to a judgment in favor of creditors would seem to furnish the fraudulent intent necessary to make the transferor liable.[17]

A mere sale is not sufficient to release the seller; there must be a record of the transfer on the books of the company. In Wright v. Stenkmeyer,[18] a case not reported in full, the following statement of a point decided is made: "Where there has been no transfer of stock by the authority of the stockholder on the books of the corporation in accordance with its by-laws, the status of the stockholder remains unchanged." To the same effect is McCaren v. Franciscus.[19] The rule that the actual holder of the stock on the books of the company is the party liable is not without exception as is shown by Dean Mfg. Co. v. Trumbull Seed Co.,[20] where the court held that where a transfer was made and the transferee was recognized by the corporation as the holder of the stock for six years thereafter the transferor was not liable to creditors on the stock although no record of the transfer was made on the books of the company. The court gave as a reason that the law of this state does not make it necessary requisite of title that the stock be transferred on the books of the corporation—hardly an adequate reason—but the case is within the recognized exception to the general rule that the transferor will not be held for unpaid stock, although the transfer was not registered where the corporation recognized the transferee as the real owner thereof.[21]

A sale to the corporation itself, even though the stock is transferred on the books of the company, will not relieve the transferor from liability as such sale is void since a corporation has no power to buy its own stock.[22]

We now come to consider under what circumstances the *transferee* is liable for the unpaid portion of the stock. As there can generally be but one person liable on the same stock, the

(11) 50 Mo. 55.
(12) Simmons v. Dent, 16 Mo. App. 288.
(13) 50 Mo. 55.
(14) 85 Mo. App. 566.
(15) 52 Mo. 558.
(16) 43 Mo. at 467, 468.
(17) Gottchalk v. Storer, 85 Mo. App. at 569.
(18) 6 Mo. App. 574.
(19) 43 Mo. at 452.
(20) 95 Mo. App. 146.
(21) See Cook on Corporations, sec. 258.
(22) St. Louis Mfg. Co. v. Hilbert, 24 Mo. App. 338; Alexander v. Rolfe, 74 Mo. at 497; Bent v. Hart, 10 Mo. App. at 147; Chrisman-Sawyer Co. v. Independent Mfg. Co., 168 Mo. 634 at 645.

question of the transferee's liability can arise only when the transferor is released. But it does not follow that whenever the transferor is released the transferee is liable and cases often arise where the creditor is without remedy against either party on unpaid stock.

The transferee is not liable where he purchased his stock without knowledge of the fact that it was unpaid stock. In Berry v. Rood,[23] the supreme court said: "The report of the referee shows that those defendants who bought shares of the treasury stock, bought it in good faith, believing it was fully paid, although they paid only fifty per cent of its face value. This treasury stock stood in the name of Jos. T. Bascome, trustee, and that fact was an indication to the purchasers that it had been previously issued and that their purchases were not original takings of the stock. There was nothing in the fact that it was sold by the company at a discount to cause the purchaser to know that it had not been originally paid in full. Such stock is liable to fluctuations. If they had purchased with knowledge of the fact that the stock was unpaid, they would assume towards the creditors of the concern the liability of the original subscriber, jointly with him or severally as the creditor might elect, but that is not the fact as to these purchasers and we hold that they are not liable in this suit. The same is true of those who purchased stock from the original subscriber, they are not liable in this suit."

So also is Johnson v. Lullman.[24] A decision to the same effect in which the stock was purchased from a stockholder instead of from the corporation, as in the above case, is Keystone Bridge Co. v. McCluney,[25] where it is held that "where stock is taken in good faith as paid up in the absence of anything which should put the purchaser on his guard and in case where the books of the company would have given no notice that the stock was not paid the purchaser in good faith is not liable to the creditors of the company." The same proposition is laid down in two cases not reported in full, viz., Mechanics Savings Inst. v. Potthof.[26]

The converse of the foregoing proposition is true so that the transferee is liable if he took the stock with knowledge of the fact that it was not paid in full. Although no express decision to that effect has been found in this state that rule is recognized as the law in the cases heretofore cited in which the absence of knowledge was held to release the transferee and is undoubtedly the settled law elsewhere.[27]

Difficulty in applying the rule may arise where actual knowledge that the stock was unpaid is not found but where facts are within the purchaser's knowledge that should lead to the conclusion that it was unpaid stock. In other jurisdictions it has been held that where the certificate indicates on its face that it has not been paid in full, the purchaser will be charged with knowledge and held liable for the amount of the unpaid subscription. And in the case of Keystone Bridge Co. v. McCluney,[28] the court intimated that if the books of the company showed that the stock was unpaid, the transferee would be charged with such knowledge. But where one purchases in the open market, certificates of stock which do not indicate whether or not they are full paid, he will be protected in the absence of knowledge on his part that they were not paid up.[29]

From the foregoing statement of the law it becomes apparent that in many cases where the stock has not been paid in full the remedy to the creditor is valueless because the stock was transferred in good faith to one who had no knowledge of the fact that the capital was not paid up. In view of the method in which stock certificates are handled in the business world to-day, it would seem that the situation would confront the creditors in many instances.

The defense is often made that the defendant is not the real owner of the stock of which he is the record holder; that he holds it in some fiduciary capacity for another such as executor, guardian, agent, trustee, or pledgee. In the absence of a statutory provision, such defense cannot prevail as the liability attaches to the holder of the legal title of the stock and the courts will not look beyond the registered shareholder to release him because he holds the stock for another. But in this state the common law has been changed by the following statutory provisions, applicable to manufacturing or business corporations, i. e., "No person holding stock in the corporation, as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder in such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as stockholders accordingly. And the estate and funds in the hands of such executor, administrator, guardians, or trustees shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if

(23) 168 Mo. l. c. 332.

(24) 15 Mo. App. 55, affirmed in 88 Mo. 567.

(25) 8 Mo. App. 496.

(26) 9 Mo. App. 574; Erskine v. Lowenstine, 11 Mo. App. 595; 82 Mo. 301; Meyer v. Mining & Milling Co., 192 Mo. at 189. A dictum to the same effect is to be found in Skrainka v. Allen, 76 Mo. at 392.

(27) See Cook on Corporations, sec. 256.

(28) 8 Mo. App. 496.

(29) Cook on Corporations, sec. 50.

he had been living and competent to act and hold the same stock in his own name." Section 1324 R. S. 1899.

The statute does not cover the cases where the record title to the stock is in an agent or a dummy, that is a trustee upon a secret trust. It has been held that one holding stock upon a secret trust for another is liable to the creditor as a stockholder.[30] No reference is made in the decision to the exemption in the statute in favor of trustees and the statute was evidently meant to embrace the case of trustees who are not holding the stock for the sole and undisclosed purpose of allowing the real owner to escape liability. It would seem that the real party in interest could also be held since those holding stock for others who desire thereby to avoid liability, or "dummies" as they are generally called, are regarded as agents in this country and the creditor by the application of the anomalous doctrine of undisclosed principal gets the benefit of the responsibility of both the dummy and the one for whom he acts.

An interesting series of cases turns upon the exemption created by the statute in favor of pledgees. The defendants, a firm of New York brokers, undertook to finance a Missouri railroad and to secure the advances made the corporation delivered to them a certificate representing a majority of the stock which was to be held in trust as a guarantee for the fulfillment of the company's contract. The stock was registered in the defendant's name and they voted it and in general exercised the privileges of stockholders. In an action by a creditor to recover from them as the holders of unpaid stock, the supreme court held that having acted as stockholders and received all the benefits of such position they could not successfully contend that they were not stockholders when creditors attempted to fix liability upon them as such; and further that they could not claim the exemption from liability conferred by the statutory provision upon pledgees because the statute was not meant to include a case where the corporation itself pledged the stock but only where there was an individual pledgor whom the statute made liable to the creditor instead of the pledgee.[31] The same question arose upon the same facts in a different proceeding in the U. S. Supreme Court and that court held that the defendants were exempt from liability under the terms of the Mo. Statute.[32] A few years later in The Union Savings Ass. v. Seligman,[33] the Missouri Supreme Court, two judges dissenting, overruled the case of Griswold v. Seligman and followed the ruling of the U. S. Supreme Court.

Upon a consideration of the two opinions it would seem that the earlier decision, while reaching what might appear to be a harsh result, is based upon a more correct interpretation of the statute. The later case, however, undoubtedly represents the law as it was followed in the case of Trust Co. v. McMillan,[34] where the facts furnished less reason for exempting the pledgee from liability since the stock was pledged and transferred by a stockholder and not by the corporation itself as in the Seligman case.

The general rule that the pledgee is liable for stock standing in his name in the absence of a statutory provision was applied in the case of Bagley v. Tyler,[35] in which case the fact that the corporation was not a Missouri corporation prevented the defendant from getting the benefit of the statute. Even in the case of stock of a foreign corporation the pledgee can escape liability, for, as pointed out in Cook on Corporations,[36] one who takes stock as collateral security and transfers it to his own name is not liable to creditors if he adds the word "pledgee" after his name on the register.

In connection with the statutory provision exempting executors from liability on stock standing in their names the question sometimes arises as to whether the stock is held as executor or administrator or whether by reason of some disposition thereof it is no longer held in such capacity so that the holder cannot take advantage of the statutory provision above quoted. In Roeder v. Knoebel,[37] it was held that an executor who inventories stock and receives it as legatee and collects the dividends upon it whether as executor or legatee, is liable to creditors of the corporation although the stock is not transferred upon the books. Similarly it was held in Coquard v. Marshall,[38] that where shares of stock were allotted to a widow out of her husband's estate and she received part of the allotment she would be liable as a stockholder although the certificates of the corporation had not been turned over to her and no transfer was made upon the books of the corporation.

The defense that the creditor had knowledge at the time the debt of the corporation was contracted that its stock was not paid in full can be successfully made. It is well settled in this state that the creditor who seeks to hold a stockholder on account of unpaid stock must be one who in good faith gave credit to the corporation in the belief that the stock was full paid. The

(30) Carp v. Chipley, 73 Mo. App. 23, 36.

(31) Griswold v. Seligman, 72 Mo. 110; Fisher v. Seligman, 75 Mo. 14.

(32) Burgess v. Seligman, 107 U. S. 20.

(33) 92 Mo. 635.

(34) 188 Mo. 548.

(35) 43 Mo. App. 195, 202.

(36) Sec. 247.

(37) 12 Mo. App. 586.

(38) 14 Mo. App. 81.

rule is thus stated in Berry v. Rood:[39] "If the creditor knowing that the corporation has accepted certain property in full payment of its stock sees fit with that knowledge to lend money to the corporation he has no more right to call the stockholder to further account for his debt than would the corporation itself."[40] This defense is not based on equitable estoppel, but upon the ground that the liability of stockholders rests upon the theory that it is a fraud upon the creditors to do business with less capital paid up than represented and that consequently a creditor who has knowledge of the fact cannot complain, because he has not been defrauded. In Carp v. Chipley,[41] it was held that an administrator is bound by the knowledge of the deceased, and in a recent case, that of Meyer v. Mining and Milling Co.,[42] it was held that where the judgment creditor becomes the assignee of the debt of the corporation by operation of law, he cannot recover if the original creditor had knowledge of the fact that the capital was not full paid. The facts of that case are interesting. It appeared that the defendant corporation was indebted to one Diekman, a stockholder of the corporation, who had full knowledge of the fact that its capital was not paid up. Diekman was indebted to plaintiff, and plaintiff, after obtaining judgment against Diekman, garnisheed the corporation and secured a judgment against it, and then proceeded against the defendant stockholder. It was held that plaintiff was the assignee by operation of law of Diekman, and was in no better position than he would be if Diekman were the plaintiff in the action, and since the defense of knowledge could be successfully set up against Diekman it was equally conclusive against the plaintiff.

The defense can be successfully made that the corporation is indebted to the stockholder who is sued in an amount in excess of the amount due on his stock. In the case of the Washington Savings Bank v. The Butchers and Drovers Bank[43] the court, after careful consideration of the matter, held that in a proceeding in equity by a judgment creditor the stockholder may set off any debt due him from the corporation. The court properly points out that this result indicates that the old doctrine of liability for unpaid stock is not founded upon any trust fund doctrine, since if liability were based upon the theory that the unpaid capital was a trust fund for the benefit of creditors it would not be proper or equitable in a suit such as that before the court, brought for the benefit of the plaintiff and all other creditors to allow the stockholder to set off the entire indebtedness to him, but only permit him to take the benefit of his proportionate share. The contrary decision in Shickle v. Watts[44] is overruled.[45]

Of course, the debts set up by the defendant stockholder as due him from the corporation must be valid debts, and accordingly it was held in the case of Shields v. Hobart,[46] that the creditor cannot set up any indebtedness due him from the corporation for money borrowed by the corporation from him to be used with his knowledge in paying improper dividends. Likewise it has been held that any debt barred by the statute of limitations cannot be used as a set-off.[47] Since, as before stated, the liability of a stockholder attaches as of the date of the return of the execution, the indebtedness of the corporation to the defendant must be one that existed in favor of the defendant at that time, and consequently it was held in Coquard v. Pendergrast,[48] that the defense of the corporation was indebted to the defendant in excess of the amount of his unpaid stock at the time the motion of the plaintiff was filed was not a good defense.

Another defense that can be made is that the plaintiff is a stockholder of the same corporation who has not paid his own stock in full. In Franklin v. Menown,[49] the court held that the law prohibited a stockholder from recovering against another until he had paid up his own stock. In that case the plaintiffs sought to avoid the operation of this rule by transferring the claim to a third party, who brought the suit, but the court held that the assignee suing is in no better position than the stockholder whom he represented, using the following language: "One stockholder being indebted to the corporation in a greater amount than the corporation is indebted to him, cannot thus obtain a collusive judgment against the corporation, and then have satisfaction therefor from another stockholder. If this suit against the corporation has been prosecuted in the name of the real parties in

(39) 168 Mo. 334.

(40) To the same effect are Woolfolk v. January, 131 Mo. 637, and Trust Co. v. McMillan, 188 Mo. 547.

(41) Carp v. Chipley, 73 Mo. App. 22 at page 36.

(42) 192 Mo. 162.

(43) 130 Mo. 155.

(44) 94 Mo. at 418.

(45) See also Webber v. Leighton, 8 Mo. App. 502, and German v. Benton, 79 Mo. 148.

(46) 172 Mo. 515.

(47) Merchants' Ins. Co. v. Hill, 12 Mo. App. 148.

(48) 35 Mo. App. 237.

(49) 10 Mo. App. 570.

interest it would have been the duty of the managers of the corporation to plead by way of counter-claim the indebtedness of the real plaintiffs, Forbes and Crawford, upon their stock subscriptions, and they could not have recovered a judgment upon the notes, and consequently could not have prosecuted this motion against Menown."

In Schaefer v. Phoenix Brewing Co.,[50] the fact that defendant had not paid for his stock in full was held not to prevent him from holding another stockholder, since the amount of the corporation's indebtedness to plaintiff largely exceeded the amount due on his stock.

The defense that another creditor has obtained a judgment against the defendant for the amount due on his stock can be successfully made. Payment of a judgment in favor of another creditor in amount equal to the unpaid balance on the stock is a complete defense, even though the judgment was obtained in a suit commenced subsequently.[51] An interesting case under this defense is Manville v. Roever, [52] where it appeared that after defendant was sued by plaintiff as a stockholder who held unpaid stock, one Fisse, a friend of the defendant, purchased certain claims against the bank and subsequently to the filing of plaintiff's suit filed suit against the defendant, and defendant interposed no defense, and Fisse obtained judgment against him. The defendant set up the recovery by Fisse as a defense to this action, and the court held that as no collusion or fraud between the defendant and Fisse were shown, the defense was good. The court further stated that it was immaterial whether or not Fisse expected at some future date to make the defendant a present of the amount paid Fisse in satisfaction of his judgment. No comment is necessary to make it plain that the line of procedure adopted in that case opens up for creditors of insolvent corporations, against which there are outstanding claims that can be purchased at a liberal discount, a very easy method of defeating the claims of bona-fide creditors.

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(50) 4 Mo. App. 115.

(51) State Savings Ass. v. Kellogg, 63 Mo. 540. And the defense will also prevail even where the payment has not been satisfied, but is suspended by an appeal. Bittner v. Lee, 25 Mo. App. 559. See State ex rel. Kohn v. Homer, 84 Mo. 598. But the mere pending of another suit, although prior in time, is no defense. Coquard v. Marshall, 14 Mo. App. 80. Mackor v. Nulhall, 13 Mo. App. 590.

(52) 11 Mo. App. 317.

DAMAGES—LIQUIDATED DAMAGES.

GUSSOW v. BETHESON.

Supreme Court of New Jersey, Feb. 24, 1908.

Where the payment of a certain sum is agreed to be made for the breach of a single stipulation in a contract, and the damages for such breach are not readily susceptible of proof, if such sum cannot be said to be in excess of what might reasonably be recovered in a suit for such damages, this sum will be held to be for liquidated damages, and not a penalty.

The payment of part of a demand entirely liquidated is not a legal satisfaction of the whole debt, although the creditor receive the smaller sum in full discharge of the full demand, and give a receipt accordingly.

VOORHEES, J.: The plaintiff and defendant entered into a written contract whereby the defendant engaged the plaintiff as manager of his tailoring business for a term of ten months at $20 a week, payable weekly, and agreed further to pay unto the plaintiff the sum of $150 at the end of said period of ten months, provided the plaintiff should have performed his duties to the best of his ability and stipulated that at the end of the said ten months the defendant would form a partnership with the plaintiff. The plaintiff agreed to pay to the defendant $500 on February 15, 1908, provided the partnership was formed; but if for some reason then unforeseen the defendant failed to enter into the partnership, then the defendant should pay to the plaintiff the sum of $300 "as his further compensation for the services rendered by him as manager, beginning September 15, 1906, and ending July 15, 1907. The case was tried before a jury. It appeared that the plaintiff acted as manager and drew the weekly payments of $20 during the period of ten months, which expired July 15, 1907, and on the 15th of July the defendant refused to form a partnership. On that date the defendant offered $150 to the plaintiff, but refused to pay him the $300 mentioned in the agreement. The plaintiff at first refused to accept the $150, and went away to consult his lawyer, but shortly afterwards came back. He testifies that the defendant said to him upon his return: "Well, do you want to take $150?" I said: "Yes; I will take it." So he called in his girl in his office and into his parlor, and she took my agreement and she put "Canceled" on it, and she gave me the $150. He said: "When Mr. Gussow signs his name give him $150. Of course I put my name to it, and she gave me $150, and I took my agreement."

It is insisted that the plaintiff should have been nonsuited, because the sum of $300 sued for was in the nature of a penalty, and

because the contract was "Canceled" by the payment of $150. The sum of $300 to be paid for the failure to form a partnership cannot be considered as a penalty. This payment was agreed to be made for the breach of a single stipulation; and the damages for such breach were uncertain and not readily susceptible of proof. Under the rule stated in Robinson v. Centenary Fund, 68 N. J. Law, 723, 54 Atl. Rep. 416, this sum will be held to be for liquidated damages, if on a reasonable view of the case they cannot be said to be in excess of what might reasonably be recovered in a suit for such damages. This was the construction put upon the contract by the trial court. The sum of $150 was due to the plaintiff for aught that had then appeared in the proofs, and the sum of $300 to be paid, provided the partnership was not performed, were liquidated damages; so that it then appeared that the defendant owed to the plaintiff the sum of $450. The payment of a part of the debt would not be a legal satisfaction of the whole debt, although the creditor received the smaller sum in full discharge of the full demand, and gave a receipt accordingly. The payment of a less sum than the amount of a demand entirely liquidated, although made and accepted in full satisfaction of such demand, being devoid of all consideration, is nugatory. Chambers v. Niagara Fire Ins. Co., 58 N. J. Law, 216, 33 Atl. Rep. 283. At the time of the motion for non suit there was no proof of any dispute between the parties as to the nonfulfillment of the contract on the part of the plaintiff and that the $150 was accepted as a compromise on that account. The motion was properly refused.

There was some evidence introduced by the defendant that he had during the period of ten months found fault with the plaintiff's conduct in coming to work late in the morning and in taking too much time at noon. The defendant's version of the alleged settlement is that he refused to enter into the partnership because the plaintiff did not attend to business as he ought, and that he told him at the time of the payment of the $150: "You don't deserve to get anything, but I will give you $150 provided everything is settled." This was denied. The trial court properly submitted to the jury the question whether or not the plaintiff had performed the services required as manager to the best of his ability, and whether there was a dispute about it, and instructed them that, if he had performed his services through the term, and there was no dispute about it, arising upon a reasonable basis, then he was entitled to the sum of $450 at the end of the term, and the payment of $150, under the circumstances, would not be a full settlement.

The jury rendered a verdict of $300 for the plaintiff, and their finding will not be disturbed.

The judgment below is affirmed.

Note—Penalties and Forfeitures, and Liquidated Damages.—The rule with regard to penalties and forfeitures was first asserted in equity for the purpose of relieving against the enforcement of penalties, where the penalty was so out of proportion to any possible damages as to be unconscionable. Before 8 & 9 Wm. III, the recovery of a penalty was for the entire amount, the only relief being in equity on the ground of fraud, extremity, or accident. At the present day where a provision is construed to be a penalty it is generally held to be void. The question most frequently raised, and which gives the courts most trouble is that of whether or not a given stipulation is a penalty or agreement covering liquidated damages. If the provision is found to be a penalty, it will be void, but if a provision for liquidated damages it will be enforced by the courts. The courts hold that it is entirely competent for the parties to agree in advance upon the matter of damages for the breach of any of the stipulations of the contract where in the nature of the case it would be difficult to ascertain the exact damages suffered, it being thought that the parties themselves are in a better position to estimate the probable damages than anyone else could be. The intention of the parties is the deciding factor, and the intention is gathered from all the circumstances, the provisions of the contract, etc. Even the use of the terms penalty or liquidated damages in the contract is not conclusive on the court. The contract may speak of it as a penalty, but from all the circumstances, the court may find that liquidated damages was intended. Similarly the terms liquidated damages may be used, and when penalty is intended. See White v. Arleth, Fed. Cas. No. 17,536, 1 Bond, 319; Johnston v. Cowan, 59 Pa. St. 275.

The principal case is one which clearly falls within the requirement of the rule as to liquidated damages, and not that of penalty and forfeiture. Usually the reasonableness of the stipulative damages will go a long way in connection with the other circumstances in determining whether or not a penalty is intended, or whether the parties have merely provided for liquidated damages. In the principal case the court finds that the amount specified as liquidated damages was reasonable, and was such an amount as would have supported the verdict of a jury. On the subject of penalties and forfeitures, see Ewing v. Litchfield, 91 Va. 575, 2 S. E. Rep. 362; Craig v. Hukill, 37 W. Va. 520, 16 S. E. Rep. 363; Kunkle v. Wherry, 189 Pa. 198, 42 Atl. Rep. 112; Jaquith v. Hudson, 5 Mich. 123; Keeble v. Keeble, 85 Ala. 552, 5 So. Rep. 149.

Accord and Satisfaction—The general rule as to accord and satisfaction is that a fixed sum, due or past due, cannot be extinguished by the payment of a less sum, even though the creditor executes a release in full. In such a case he is entitled to demand the balance due. If the claim, however, is an unliquidated claim, or a claim in which there is an honest dispute

between the parties, then the acceptance of a lesser sum would be valid.

The reason for the rule as laid down by the authorities is that such an agreement would be without consideration. The rule is stated as follows, in 1 Cyc. 322: "In the absence of statute providing otherwise, the rule is settled except in one state, that the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof, though accepted as such; and it is immaterial that the debtor knew that there was error or fraud."

BOOKS RECEIVED.

REMINGTON ON BANKRUPTCY.

This excellent work is complete in two volumes, the development of bankruptcy law is briefly presented from the first English bankruptcy act, 1542, 34 Henry VIII, to the present time. The work is based, however, upon the bankruptcy law of 1898, with the amendment of 1903. The constitutionality of the act is first considered by the author, and then the general nature, scope and construction of the act is considered. Many very perplexing problems have arisen under this act, and have been presented to the courts for adjudication, and those attorneys who have occasion from time to time to appear before the bankruptcy courts will find to be of great value a clear and analytical presentation of the principles of the law of bankruptcy, as contained in this work. In addition to the statement of the principles the author has cited numerous authorities, and has made very liberal use of the bankruptcy decisions. Great skill has been shown in the selection of excerpts. The portions of the opinions set out are directly in point, and space has not been taken up by irrelevant matter; the law is therefore presented in a very thorough manner, and decisions directly in point are set out sufficiently to avoid the necessity as a general rule of referring to the original decisions. In addition to this, authorities are cited on every proposition that has arisen. The book is by Harold Remington, referee in bankruptcy, Cleveland, Ohio. Published by the Michie Company, Charlottesville, Va.

JETSAM AND FLOTSAM.

PROPOSED FEDERAL INHERITANCE TAX LAW.

In view of this proposed legislation Secretary Straus, of the Department of Commerce and Labor, has prepared and issued a pamphlet of 69 pages containing a digest of Inheritance Laws of Great Britain, France and Germany, together with much other interesting information.

Inheritances are now taxed to a greater or less extent in thirty-six states of the Union, and in Hawaii and Porto Rico. Twenty-six states tax both direct and collateral heirs, and in thirteen states the inheritance tax is in some degree progressive. Wisconsin, California, Idaho, Minnesota and Massachusetts have progressive rates for both direct and collateral heirs; in Illinois, Colorado, Nebraska, South Dakota and Oregon the progressive rates apply only to distant relatives and strangers in blood; in North Carolina and Washington they extend to all collateral heirs. Minnesota and Utah make no distinction between direct and collateral heirs; in all other cases in which direct heirs are taxed at all the rates are much lower, and the exemption (except in Connecticut and North Carolina) much larger than for collateral heirs. Iowa and Washington discriminate against non-resident aliens in the case of collateral inheritance.

The total state revenue from inheritance taxes for the latest available fiscal year was $10,028,451.71.—The American Lawyer.

HUMOR OF THE LAW.

It was sentence day in the city court. A man in the prisoners' pen, who had been sentenced to two years for larceny, began to cry softly. The big man next him, who was going to serve seven years for bigamy, said:

"Aw, wotcher sniffin' about?"

"I'm—I'm—th-th-thinkin' about leavin' (sob) my—my—family. Lea-leavin' my wife—"

"Aw, cut it out! Look at me. I ain't cryin', am I? An' I'm leavin' two of 'em."

When Theodore Roosevelt was police commissioner in New York he asked an applicant for a position on the force:

"If you were ordered to disperse a mob, what would you do?"

"Pass around the hat, sir," was the reply.

"What are they moving the church for?"

"Well, stranger, I'm mayor of these diggin's, an' I'm fer law enforcement. We've got an ordinance what says no saloon shall be nearer than three hundred feet from a church. I give 'em three days to move the church."—Law Students' Helper.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Acknowledgment**—Seal.—The seal engraved on a certificate of acknowledgment of a commissioner of deeds in 1859 held sufficient.—Stark v. Harris, Tex., 106 S. W. Rep. 887.

2. **Account**—Pleading.—When a bill is for a general accounting and investigation of transactions between the parties, every item embraced in those transactions is properly considered as within the scope of the bill, though such items may not have been specifically mentioned in the bill.—King v. Bell, Fla., 45 So. Rep. 488.

3. **Alteration of Instruments**—Effect on Right of Parties.—Change of place of payment in a note by the payee after delivery and without consent makers held to avoid it between the parties.—Mitchell v. Reed's Ex'r, Ky., 106 S. W. Rep. 833.

4. **Appeal and Error**—Directed Verdict.—On writ of error to review a judgment on a verdict directed for defendant after plaintiff's motion for a discontinuance had been denied, held, that the court might consider the case as one pending, and determine the question whether the trial court erred in directing the verdict.—Foss v. Brown, Mich., 114 N. W. Rep. 873.

5.——Discretion of Trial Court.—The discretion of the trial court in refusing a stay of proceedings till payment of costs in a former action will not be reviewed on appeal in the absence of abuse of such discretion.—Brinsfield v. Howeth, Md., 68 Atl. Rep. 566.

6.——Dismissal.—An appeal in an equity case taken after a final decree solely from an interlocutory order not bringing up such final decree for review will be dismissed.—Stanley v. Standard Cypress Co., Fla., 45 So. Rep. 478.

7.——Disposition of Cause.—On plaintiff's appeal, the court's ruling against one of the defendants, though erroneous, affirmed; there being no cross-appeal by such defendant.—Baldwin v. Dreyfus, Miss., 45 So. Rep. 428.

8.——Evidence.—Where evidence of defendant's quarrelsome disposition was competent, the admission of a letter to impeach her veracity and to show her quarrelsome disposition held not reversible error.—Curtice v. Dixon, N. H., 68 Atl. Rep. 587.

9.——Harmless Error.—Though in a personal injury action the court might properly have forbidden the reading of a statute of another state wherein the injury occurred, the reading thereof held not ground of reversal.—Southern Ry. Co. v. Isom, Miss., 45 So. Rep. 424.

10.——Persons Entitled to Assign Error.—An executor held not entitled to assign error on appeal from an order directing the proponent and special administrator to pay funds to contestants to procure the attendance of witnesses.—In re McNaughton's Will, Wis., 114 N. W. Rep. 849.

11.——Pleading.—Where there was no motion in the trial court that a demurrer to certain paragraphs of the answer should be carried back and sustained to the petition, defendant could not allege error on appeal that such proceedings were not adopted.—United States Fidelity & Guaranty Co. v. Paxton, Ky., 106 S. W. Rep. 841.

12.——Pleading.—Where a declaration stated a good cause of action as against a demurrer, an application to correct the record by supplying copies of docket entries showing a demurrer, and an order overruling it, will be denied.—Watson v. McHenry, Md., 68 Atl. Rep. 606.

13.——Questions Presented.—Where record fails to set out excluded testimony, appellate court cannot determine its relevancy or prejudice from ruling.—Western Commercial Travelers' Ass'n v. Tennent, Mo., 106 S. W. Rep. 1073.

14.——Substitution of Parties.—Proceedings to make representatives of deceased appellee parties are rightfully taken in the Supreme Court of the United States, rather than in the court below, after appeal allowed and citation issued.—Southern Pine Lumber Co. v. Ward, U. S. S. C., 28 Sup. Ct. Rep. 239.

15. **Appearance**—Effect as Waiver.—The right of defendant in a federal court on the ground that a federal question is involved to be sued in the district of which it is an inhabitant held waived by entering an appearance generally and pleading to the merits.—Logan & Bryan v. Postal Telegraph & Cable Co., U. S. C. C., E. D. Ark., 157 Fed. Rep. 570.

16. **Assignments**—Contracts Assignable.—The fact that a contract for services involves personal trust and confidence, and is therefore not assignable as an entirety, does not prevent the assignability of rights arising out of such contract, as for compensation earned thereunder, where the matter of personal confidence is not involved in such rights.—In re Wright, U. S. C. C. of App., Second Circuit, 157 Fed. Rep. 544.

17. **Attorney and Client**—Compensation of Attorney.—In estimating the value of services rendered by an attorney it is proper to take into account the time necessarily employed in, and the importance and success of, the litigation, as well as his ability, learning, and experience, and his standing, in the profession.—Graham v. Dubuque Specialty Mach. Works, Iowa, 114 N. W. Rep. 619.

18.——Duty of Counsel.—It is the duty of counsel designated by the court to defend an accused to give his professional assistance.—Cutts v. State, Fla., 45 So. Rep. 491.

19. **Bankruptcy**—Future Commissions of Life Insurance Agent.—The interest of a bankrupt life insurance agent in renewal premiums on policies previously written to which he was entitled under his contract on their collection held property which he could have transferred, and which passed to his trustee under Bankr. Act ch. 541, § 70a.—In re Wright, U. S. C. C. of App., Second Circuit, 157 Fed. Rep. 544.

20.——Liens.—Liens taken on the property of a bankrupt held not void for fraud because of subsequent false or misleading statements made by the creditor to another creditor where they induced no action by such creditor or others to their injury.—In re Gerstman, U. S. C. C. of App., Second Circuit, 157 Fed. Rep. 549.

21.——Property of Bankrupt.—Ordinarily the title of non-exempt property of a bankrupt passes to his trustee, who, pending the bankruptcy proceedings, is alone entitled to sue to enforce rights incident thereto.—Briggs v. Avary, Tex., 106 S. W. Rep. 904.

22.——Purchase of Claims by Assignee.—An assignee or trustee in bankruptcy cannot be permitted to make a profit out of his trust; and, where he has purchased a claim against the estate for less than its face value, dividends will be allowed thereon only to the extent of the amount paid therefor, with interest, even though he has transferred the claim to another.—In re Sweetser, U. S. C. C., D. Mass., 157 Fed. Rep. 567.

23.——Rescission of Sale of Goods to Bankrupt.—A seller of goods to a bankrupt who acted promptly in the exercise of his right to rescind the sale for fraud held entitled to the allowance of his debt as a preferred claim; the goods having been taken and sold by the trustee.—William Openhym & Sons v. Blake, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 536.

24. **Banks and Banking**—Guardian and Ward.—Money deposited in a bank by a guardian to his credit as guardian is the property of the ward, and the bank cannot apply it to the payment of any order made by the guardian in any other character than that of guardian.—Moore v. Hanscom, Tex., 106 S. W. Rep. 876.

25. **Brokers** — Compensation.—Broker not having procured a purchaser willing to pay the sum stipulated, but only a less sum, the owner held entitled to reject the offer and sell the remainder of the land, after the sale of a portion by him, and not liable for commissions on such sale.—Newton v. Conness, Tex., 106 S. W. Rep. 892.

26. **Carriers**—Liability for Baggage.—A carrier's liability for baggage checked held not lessened because the baggage did not go by the same train the passenger did.—Moffat v. Long Island R. Co., 107 N. Y. Supp. 1113.

27.——Safety Appliance Act.—When an engine is engaged in interstate commerce, any car or cars attached to that engine are used in connection with a car engaged in interstate commerce, and consequently come within the amendment of the safety appliance act (Act March 2, 1903, c. 976, 32 Stat. 943, U. S. Comp. St. Supp. 1907, p. 885).—United States v. Chicago & N. W. Ry. Co., U. S. D. C., D. Neb., 157 Fed. Rep. 616.

28. **Chattel Mortgages**—Property Subject.—Between the parties, it is only necessary to identify the chattels so that the mortgagee may with reasonable certainty say what property is subject to his lien.—Davis v. Horne, Fla., 45 So. Rep. 476.

29. **Constitutional Law**—Curative Acts.—Where a bill filed to restrain the execution of a contract by a county alleges irregularities as to matters that the legislature could dispense with in the first instance, an act passed by the legislature after the commencement of such contract approving it purges it of all such irregularities.—Cranor v. Board of County Commissioners of Volusia County, Fla., 45 So. Rep. 455.

30.——Impairment of Contract.—Contracts permitting lotteries or dealings declared by statute to be gambling held not within the protection of the constitutional provision prohibiting impairment of contracts.—Logan & Bryan v. Postal Telegraph & Cable Co., U. S. C. C., E. D., Ark., 157 Fed. Rep. 570.

31.——Legislative Powers.—Laws 1900, p. 457, c. 307, sec. 10, held not unconstitutional as undertaking to ratify in advance all powers and privileges to be granted a railway company by counties and municipalities.—Jeffers v. City of Annapolis, Md., 68 Atl. Rep. 553.

32.——Reasonableness.—Statement as to how far a statute requiring a railroad company to instruct and maintain a station at a certain point was reviewable by the court on the ground of reasonableness.—Louisiana & A. Ry. Co. v. State, Ark., 106 S. W. Rep. 960.

33. **Contempt**—Indirect or Constructive Contempt.—An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due administration of justice.—Ex parte Clark, Mo., 106 S. W. Rep. 990.

34.——Proceedings Incident to Other Case.—Where a contempt is committed in connection with an injunction case, it is not necessary to docket a new case against the contemnor.—Hatlestad v. Hardin County District Court, Iowa, 114 N. W. Rep. 628.

35. **Contracts**—Illegal Consideration.—Where a child enters into an agreement with his father that on transfer of certain property rights he would release all claims against his father's estate, that among the releases was a promise not to institute criminal proceedings, held not to invalidate the advancement.—Hilton v. Hilton, Me., 68 Atl. Rep. 595.

36.——Undue Influence.—Where the maker of a contract had mind enough to understand the nature of the transaction, and was executing a fixed purpose of his own, the contract held not to be set aside for undue influence.—Wright's Executor v. Wright, Ky., 106 S. W. Rep. 856.

37. **Conversion**—Direction in Will.—Testator's intent that real estate should be converted held to be gathered from the scope of the will and the necessity of a sale to carry out its provisions.—Boyce v. Kelso Home for Orphans of M. E. Church, Md., 68 Atl. Rep. 550.

38. **Corporations**—Doctrine of Corporate Entity.—The doctrine of corporate entity is not so sacred that a court of equity looking through forms to the substance of things may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud.—In re Rieger, Kapner & Altmark, U. S. D. C., S. D. Ohio, 157 Fed. Rep. 609.

39.——Knowledge of Agents.—Knowledge acquired by the officers or agents of a corporation while not acting for it is not imputable to the corporation.—Aycock Bros. Lumber Co. v. First Nat. Bank, Fla., 45 So. Rep. 501.

40.——Stockholders Suing for Corporation.—Where stockholders sue on behalf of the corporation, which refuses to act, they are not entitled to reimbursement for their expenses unless the suit is successful.—Graham v. Dubuque Specialty Mach. Works, Iowa, 114 N. W. Rep. 619.

41. **Costs**—Statutory Provisions.—At common law no recovery of costs was permitted, and statutes authorizing their allowance will be strictly construed.—Lucas v. Brown, Mo., 106 S. W. Rep. 1089.

42. **Criminal Trial**—Evidence.—On an issue of prejudice of the inhabitants of a county, on an application for a change of venue, a witness should have been permitted to testify that the people were highly incensed at the time, and that the sentiment was against defendant.—State v. Vickers, Mo., 106 S. W. Rep. 999.

43.——Misuse of Pronouns.—Misuse of the pronoun "he" for the pronoun "she," in an order fixing bail, held not to affect magistrate's

jurisdiction to issue a commitment.—People v. Warden of City Prison of City of New York, 107 N. Y. Supp. 1103.

44.——Right to Counsel.—Where a party charged with felony has no attorney, and is unable to employ one, if he signifies his desire to be represented by one, it is the practice of the trial judge to appoint an attorney under Bill of Rights, sec. 11, and Gen. St. 1906, sec. 3969.—Cutts v. State, Fla., 45 So. Rep. 491.

45. **Damages**—Liquidated Damages.—Where a contract for the sale of land provides for the payment of a certain amount to either party in case of breach by the other, the amount, not being disproportionate to the values involved, will be held liquidated damages and not a penalty.—Selby v. Matson, Iowa, 114 N. W. Rep. 609.

46. **Deeds**—Extent of Land Conveyed.—Where a deed conveys a tract "containing 800 acres more or less, bounded north by lands of M., south by lands of V., east by river B." the sale was by boundary, and not by the number of acres in the tract.—Jenkins v. Salmon Brick & Lumber Co., La., 45 So. Rep. 435.

47.——Undue Influence.—Whenever a person through age, decrepitude, affliction, or disease becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside.—West v. Whittle, Ark., 106 S. W. Rep. 955.

48. **Descent and Distribution**—Advancements.—Where a parent makes advancements to a son in bar of all claims against his estate after his death, that after such death the other heirs for a time admitted a claim of such child does not estop them from afterwards denying his right to such share.—Hilton v. Hilton, Me., 68 Atl. Rep. 595.

49. **Divorce** — Extraterritorial Effect.—The statute of New York and a decree passed thereunder prohibiting the remarriage of a divorced person in the lifetime of the other spouse held to have no extraterritorial effect.—Dimpfel v. Wilson, Md., 68 Atl. Rep. 561.

50.——Ungovernable Temper.—The law will not grant a divorce for post-nuptial causes not rendering one of the parties incapable of performing the duties incident to the marriage status.—Hickson v. Hickson, Fla., 45 So. Rep. 474.

51. **Dower**—Conveyance by Widow.—A conveyance by a widow of her dower interest to the administrator of the estate held valid as against the objection that the consideration therefor was inadequate, and that it was procured by the fraud of the administrator.—Flowers v. Flowers, Ark., 106 S. W. Rep. 949.

52. **Easements**—Appurtenant to Land.—Right of way appurtenant to a tract of land still exist for all purposes for which they were created, though the dominant estate is being diverted from the purposes of the trust created therein.—Greist v. Amrhyn, Conn., 68 Atl. Rep. 521.

53.——Location or Route.—Change of location of a passway across lands of another for the convenience of the owner held not to destroy the right of way nor prevent the claimant from asserting a right thereto by adverse use.—Boyd v. Morris, Ky., 106 S. W. Rep. 867.

54. **Electricity** — Negligence. — An electric light company which furnishes electricity for lighting a dwelling owes a duty to exercise a proper degree of care to prevent a dangerous current from entering the house, and owes this duty, not only to the owner, but to his family, servants, employees, and all other persons who may rightfully be upon the premises.—Union Light, Heat & Power Co. v. Arntson, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 540.

55. **Equity**—Decree Pro Confesso.—Where the clerk of court improperly entered a decree pro confesso, without any order from the court, but by an order thereafter, on a motion to vacate the decree, the action of the clerk in entering the decree was recognized, no reversible error is shown.—King v. Bell, Fla., 45 So. Rep. 488.

56.——Laches.—Objection of laches on the part of grantor in attacking a sale in attachment of property covered by a trust deed held not available to defendant in a suit to set aside the attachment and enforce the trust deed.—Southern Pine Lumber Co. v. Ward, U. S. S. C., 28 Sup. Ct. Rep. 239.

57. **Evidence**—Character of Person.—On an issue whether an uncle believed that his niece had an irritable disposition, outward manifestations by her of such disposition held relevant, in connection with evidence of his declaration that he had such a belief.—Curtice v. Dixon, N. H., 68 Atl. Rep. 587.

59.——Construction of Deed.—In the absence of mutual mistake or fraud, and in the absence of any ambiguity in a deed, the grantor cannot cut down the operative words of a deed by proof of his intentions.—Weissenfels v. Cable, Mo., 106 S. W. Rep. 1028.

60.——Reply Letters.—A letter received purporting to come in answer from the person to whom a prior letter had been addressed and mailed is admissible without specific proof of the genuineness of the signature.—Lancaster v. Ames, Me., 68 Atl. Rep. 533.

61. **Execution**—Effect of Irregularities.—An execution sale of real estate held to convey a perfectly good title, its being under a third execution, instead of under a venditioni exponas, being no such irregularity as would invalidate it in the hands of an innocent purchaser.—Baldwin v. Dreyfus, Miss., 45 So. Rep. 428.

62.——Who Are Assignees of Judgment.—An agreement entitling petitioner to one-half the proceeds of all suits instituted by him in the name of the party signing the agreement held not an assignment of a decree obtained in the name of such party, within Code 1896, sec. 1928.—Reese v. Waller, Ala., 45 So. Rep. 468.

63. **Executors and Administrators**—Appointment.—Only one person should be appointed to administer the estate of a decedent, and, where a will appoints an executor, he, if competent, should administer the estate.—In re Maccaffil 107 N. Y. Supp. 1115.

64.——Right of Administration.—A testator specifically devising real estate only, leaving personalty undisposed of, who appoints an executor, shows an intention that the executor shall administer the personalty; otherwise he would have nothing to do.—In re Maccaffil, 107 N. Y. Supp. 1115.

65.——Right of Appointment.—A renunciation by the widow of an intestate of her right to administer his estate is irrevocable unless the renunciation was made under a mistake of fact.—Slay v. Beck, Md., 68 Atl. Rep. 573.

66. **False Pretenses**—What Constitutes.—If the statement of fact and the promise constituting the false pretense can be separated and the prosecutor relied in part on the former, the defendant may be convicted on the false state-

ment of fact.—Morris v. State, Fla., 45 So. Rep. 456.

67. **Federal Courts**—Appeal from Supreme Court of Oklahoma.—Jurisdiction of supreme court of United States on appeal from decree of territory of Oklahoma, in a case tried by the court, is confined to determining whether there was evidence to support the finding, and whether the finding sustained the judgment by virtue of Rev. St. Okl. 1903, sec. 279.—Southern Pine Lumber Co. v. Ward, U. S. S. C., 28 Sup. Ct. Rep. 239.

68.——Jurisdiction.—A suit of a Pennsylvania and New Jersey corporation against a New York corporation, operating a street railway in the city of New York, held to substantially involve a controversy between citizens of different states within Act August 13, 1888, c. 866, sec. 1, 25 Stat. 433 (U. S. Comp. St. 1901, pp. 507, 508).—In re Reisenburg, U. S. S. C., 28 Sup. Ct. Rep. 219.

69. **Fraud**—Means of Knowledge of Facts.—Neither law nor equity will afford relief on the ground of false representation where the subject-matter is equally known to both parties, or where both parties have equal means of information, and regarding which one or the other is negligent.—Hines v. Royce, Mo., 106 S. W. Rep. 1091.

70. **Frauds, Statute of**—Part Performance.—Parol evidence is inadmissible to prove a contract within the statute of frauds, in the absence of evidence of part performance or other circumstances sufficient to take the case out of the statute.—Carr v. Carr, R. I., 68 Atl. Rep. 582.

71. **Gaming**—Purchase of Stock on Margins.—When money is deposited or loaned to be used in the purchase of stock on margins, the promise of the one with which it is deposited or loaned to repay is based on an illegal consideration and cannot be enforced.—Lancaster v. Ames, Me., 68 Atl. Rep. 533.

72. **Garnishment**—Property Subject.—Under Pub. St. 1901, c. 245, sec. 5, providing that a person doing business in this state may be summoned upon trustee process, the property of a nonresident landowner in the charge of his resident agent may be attached by a creditor on such process.—Bennett v. Hebbard, N. H., 68 Atl. Rep. 537.

73. **Guardian and Ward**—Private Sale of Ward's Property.—Though a private sale by a tutor of a minor's property is void, the minor is bound to account to the purchaser for the proceeds used in the payment of the debts for which his estate is liable.—Touchy v. Gulf Land Co., La., 45 So. Rep. 434.

74. **Habeas Corpus**—To Anticipate Regular Course of Proceedings.—Habeas corpus will not issue on behalf of a person imprisoned in default of payment of a small fine for disobeying a preliminary injunction granted by a federal circuit court, restraining the enforcement of a judgment of a state court, to inquire into the jurisdiction to grant the injunction.—Ex parte Simon, U. S. S. C., 28 Sup. Ct. Rep. 238.

75. **Husband and Wife**—Community Property.—Where the community did not own an amount deposited in bank to the credit of opponent's husband it cannot be placed to the credit of the community.—Succession of Verneuille, La., 45 So. Rep. 520.

76. **Indictment and Information**—Name of Accused.—Where there is but a single defendant named in an indictment and his name is correctly given as "Giles Morris," except in one place in which he is referred to as "the said Gules Morris," the mispelling does not vitiate the indictment.—Morris v. State, Fla., 45 So. Rep. 456.

77.——Words of Statute.—An indictment need not use the precise words of the statute if words of like import are used and all the facts constituting the offense are stated.—Sherrill v. State, Ark., 106 S. W. Rep. 967.

78. **Infants**—Necessity of Guardian ad Litem.—Where decedent's land descended to his minor children, to subject it to a vendor's lien, it is necessary that they be represented by a guardian ad litem.—Shehane v. Caraway, Ala., 45 So. Rep. 469.

79. **Injunction**—Criminal Prosecutions.—A court of equity has no power to restrain criminal proceedings, except where the equity proceedings are merely ancillary to proceedings already pending, or where property rights will be destroyed.—Logan & Bryan v. Postal Telegraph & Cable Co., U. S. C. C., E. D. Ark., 157 Fed. Rep. 570.

80.——Erroneous Order.—A temporary mandatory injunctional order, issued by a court with jurisdiction, though erroneous, is not void, and must be obeyed until set aside or reversed.—Hatlestad v. Hardin County District Court, Iowa, 114 N. W. Rep. 628.

81.——Irreparable Injury.—A property owner held not to have sustained an irreparable injury by the construction of a drain with an outlet on her property, and was therefore not entitled to an injunction restraining the maintenance of the drain.—Devou v. Pence, Ky., 106 S. W. Rep. 874.

82.——Restraining Proceedings at Law.—An injunction staying a proceeding at law operates in restraint of the party, and is not a prohibition on the action of the legal tribunal, and a judgment of such court is not void because of disobedience of the injunction.—Geddis v. Donovan, Mich., 114 N. W. Rep. 874.

83. **Interstate Commerce**—Discrimination in State Tax Laws.—A tax on property within the state, which is the product of the soil of other states, imposed under Const. Tenn. 1870, art. 2, secs. 28-30, and Acts Tenn. 1903, p. 632, c. 258, secs. 1, 2, held to violate Const. U. S. art. 1, sec. 8, as an interference with interstate commerce.—J. M. Darnell & Son Co. v. City of Memphis, U. S. S. C., 28 Sup. Ct. Rep. 247.

84.——Police Powers of State.—Acts of the state in the proper exercise of its police power will not be declared void under the commerce clause of the Constitution of the United States, if their purpose is to protect its people against wrong, fraud, contagious disease, or acts which will corrupt their morals.—Logan & Bryan v. Postal Telegraph & Cable Co., U. S. C. C., E. D., Ark., 157 Fed. Rep. 570.

85.——Powers of State.—Neither the Constitution nor laws of the United States prohibit a state from taxing the property of persons and corporations engaged in foreign and interstate commerce where the property is located in such state.—State v. Wiggins Ferry Co., Mo., 106 S. W. Rep. 1005.

86. **Intoxicating Liquors**—Wrongful Sale.—Where defendant procured orders for whisky in prohibition territory and then purchased the whisky himself and delivered it to his customers, he was not guilty of soliciting orders for whisky as an "agent," in violation of Acts 1907, p. 327.—State v. Earles, Ark., 106 S. W. Rep. 941.

87. **Judgment**—Unauthorized Appearance by Attorney.—Failure of a person not named as a party, and not summoned, against whom a judgment was rendered, to move for a new trial or appeal, held no objection to her right to sue to vacate the judgment.—Owens v. Cage & Crow, Tex., 106 S. W. Rep. 880.

88. **Jury**—Right of Incorrigibles to Trial by Jury.—Laws 1905, p. 66, c. 5388, sec. 9, authorizing the commitment of any person of incorrigible conduct to the state reform school without a trial by jury, is unconstitutional.—Pugh v. Bowden, Fla., 45 So. Rep. 499.

89. **Justices of the Peace**—Collateral Attack of Judgment.—On collateral attack of a judgment of a justice, held it would be presumed that his appointment of a private person to serve the writ was authorized by the circumstances.—Alfred v. Batson, Miss., 45 So. Rep. 465.

90. **Landlord and Tenant**—Negligence.—A declaration setting forth an injury received from an article thrown from the window of a building leased by defendant, but not setting forth any facts of negligence, held insufficient.—Carl v. Young, Me., 68 Atl. Rep. 593.

91. **Libel and Slander**—Damages.—In libel for charging with swearing falsely a village attorney, evidence of loss of business after the libelous publication held proper.—Smith v. Hubbell, Mich., 114 N. W. Rep. 865.

92.——Innuendoes.—In an action for slander, an innuendo cannot add to or enlarge the sense of the words used, and alleged defamatory words, not constituting slander in themselves, cannot be made so by innuendoes.—Brinsfield v. Howeth, Md., 68 Atl. Rep. 566.

93.——Malice.—A charge in an action for slander that plaintiff was entitled to recover if the statements were false held erroneous as making the case turn on the truth or falsity of the defamatory words, instead of the existence of malice.—Laughlin v. Schnitzer, Tex., 106 S. W. Rep. 908.

94. **Life Insurance**—Payment of Note After Default.—Payment of a premium note after default and forfeiture of the policy for the protection which the assured had received prior to maturity of the note held insufficient to contine the policy in force.—Lesseps v. Fidelity Mut. Life Ins. Co. of Philadelphia, La., 45 So. Rep. 522.

95. **Logs and Logging**—Construction of Contract.—In determining what would be a reasonable time to be allowed the purchaser of growing timber to remove the same, all the facts and circumstances should be considered.—McNair & Wade Land Co. v. Adams, Fla., 45 So. Rep. 492.

96.——Conveyance of Standing Timber.—A deed of standing merchantable timber specifying no time for its removal held to convey an estate in the timber terminable after a reasonable time for the removal.—Garden City Stave & Heading Co. v. Sims, Ark., 106 S. W. Rep. 959.

97.——Sale of Standing Timber.—A contract for the sale of standing timber, which specifies no time for the removal thereof, requires their removal within a reasonable time, and operates to convert the trees into personal property.—V. Bowerman & Co. v. Taylor, Ky., 106 S. W. Rep. 846.

98. **Mandamus**—Interlocutory Motions.—An interlocutory motion will not be reviewed on mandamus when the court does not refuse to proceed with the case, if there is another adequate remedy.—Geddis v. Donovan, Mich., 114 N. W. Rep. 874.

99. **Master and Servant**—Assumed Risks.—An adult may assume the risks incident to insecure premises or insufficient tools, and if he does so with full knowledge of the conditions, the master is not liable for injuries resulting therefrom.—B. F. Avery & Sons v. Lung, Ky., 106 S. W. Rep. 865.

100.——Defective Machinery.—Notice of infirmity in a machine to defendant's former superintendent held notice to defendant, though the superintendent did not occupy such position at the time of plaintiff's injuries.—Fleming v. Northern Tissue Paper Mill, Wis., 114 N. W. Rep. 841.

101.——Duty to Warn Servant.—A master's duty to warn his employee of new and latent dangers cannot be delegated so as to relieve the master from the results of of non-performance.—Schminkey v. T. M. Sinclair & Co., Iowa, 114 N. W. Rep. 612.

102.——Injury to Servant.—A petition setting forth the cause of an explosion by which plaintiff was injured held not demurrable as not stating with sufficient certainty the nature of the particular liquid or substance by whose presence the explosion was caused.—Lumpkin v. Reiser Mach. Shops, La., 45 So. Rep. 518.

103.——Liability for Servants' Unauthorized Act.—The owner of a passenger elevator cannot escape liability for the negligent killing of a boy who was permitted to ride on top of the elevator by the operator, on the ground that the operator was unathorized to grant such permission.—Davis' Administrator v. Ohio Valley Banking & Trust Co., Ky., 106 S. W. Rep. 843.

104.——Safe Place to Work.—A workman is entitled to protection when in the discharge of duties incidentally arising under his employment.—Rochelle v. White Castle Lumber & Shingle Co., La., 45 So. Rep. 449.

105. **Mortgages**—Fraud.—Fraud is not to be presumed; and in an action to cancel a trust deed for fraud, the proof of fraud should be clear and convincing.—Christian v. Green, Miss., 45 So. Rep. 425.

106.——Redemption.—A mortgage conditioned to be void if the mortgagor paid the mortgagee $15 per month for life, the taxes on the property, and kept the buildings insured for the mortgagee's benefit, held within Pub. St. 1901, c. 139, secs. 4-13, providing for the redemption of land from the lien of a mortgage.—Shute v. Bartlett, N. H., 68 Atl. Rep. 536.

107. **Municipal Corporation**—Charter Amendments.—The amendment of a town charter is binding, though the whole amendment was submitted to the electors and adopted as one amendment, and though it was not specially numbered.—Coreil v. Town of Welsh, La., 45 So. Rep. 438.

108.——Construction of Ordinance.—An ordinance establishing public scales, and declaring that commodities specified shall not be sold without being weighed thereon, held not to require one selling a commodity specified to first have it weighed on such scales, where it is weighed on the purchaser's scales.—City of Fulton v. Sims, Mo., 106 S. W. Rep. 1094.

109.——Fire Department.—Fire department held to have no such management of the apparatus as is contemplated by Rev. Codes 1905, sec. 2968, so as to entitle it to a share of the fund received from insurance premiums.—Con-

tinental Hose Co. v. City of Fargo, N. D., 114 N. W. Rep. 834.

110.——Liability for Defective Streets.—A city is liable for injuries resulting from defects in its streets, though not expressly made so, unless relieved therefrom by charter provision or otherwise.—City of Bessemer v. Carroll, Ala., 45 So. Rep. 419.

111. **Navigable Waters**—Obstruction by Logs—The driving and temporary storing of logs, although now of principal importance, may become secondary in importance to that of travel of summer residents and the large transportation of merchandise for their accommodation.—Smart v. Aroostook Lumber Co., Me., 68 Atl. Rep. 527.

112. **Negligence**—Contributory Negligence.—A 12-year-old boy's contributory negligence in riding on top of a passenger elevator and attempting to get off through an opening in the shaft held not necessarily to defeat recovery for his death caused by a negligent starting of the elevator.—Davis' Administrator v. Ohio Valley Banking & Trust Co., Ky., 106 S. W. Rep. 843.

113.——Contributory Negligence.—A painter employed by a subcontractor in a building which defendant was constructing held negligent in failing to ascertain whether a certain rail was properly secured before using it as a support.—Dubrule v. Benjamin F. Smith Co., R. I., 68 Atl. Rep. 544.

114. **New Trial**—Misconduct of Jury.—Where there is misconduct in interfering with the jury it requires the grant of a new trial if the misconduct may reasonably have had an unfavorable effect on the moving party.—Akin v. Lake Superior Consol. Iron Mines, Minn., 114 N. W. Rep. 654.

115. **Parties**—Intervention.—A federal circuit court which has acquired jurisdiction over a street railway company, and has appointed receivers, may in its discretion permit another street railway company to intervene, extending the receivership to it, where the two companies sustained the relation of lessee and lessor.—In re Reisenberg, U. S. S. C., 28 Sup. Ct. Rep. 219.

116.——Intervention.—Where by an assignment of interest in the cause of action plaintiff retains any substantial interest, or may become liable to the assignee, intervention and not substitution is the proper remedy.—Walker v. Sanders, Minn., 114 N. W. Rep. 649.

117. **Partition**—Dismissal of Bill.—A bill for partition cannot be treated as a bill to quiet title, where it shows the defendants are in possession.—Warren v. Warren, Mich., 114 N. W. Rep. 867.

118. **Payment**—Duress.—In an action to recover notes and securities given as fees for legal services to be rendered, such fees, in the absence of explanation, held unreasonable and oppressive, warranting the relief prayed.—Pindall v. Waterman, Ark., 106 S. W. Rep. 964.

119.——Mistake or Fraud.—Where a debtor was induced to transfer a mare to his creditor in settlement of the balance of an account which, through mistake or fraud, consisted of an item which had been paid, the measure of the debtor's recovery was the value of the mare, not the alleged balance of the debt.—Johnson v. Saum, Iowa, 114 N. W. Rep. 618.

120. **Pleading**—Waiver of Defense.—Consent of defendant to appointment of receiver, without setting up defense that complainants were not judgment creditors with execution returned unsatisfied, held a waiver of that defense.—In re Reisenberg, U. S. S. C., 28 Sup. Ct. Rep. 219.

121. **Pledges**—Rights of Third Parties.—Rights of an indorser of outstanding note to enforce collateral is a matter solely between himself and the pledgors, with which purchasers of property covered by the trust deed under sale in attachment are not concerned.—Southern Pine Lumber Co. v. Ward, U. S. S. C., 28 Sup. Ct. Rep. 239.

122.——Sale of Property.—Where the holder of a note secured by the pledge of the indorser's property sells it in satisfaction of the debt, and the note is paid, the holder cannot put the note in circulation by indorsing it to the purchaser of the pledged property.—Smith v. Shippers' Oil Co., La., 45 So. Rep. 533.

123. **Principal and Agent**—Sub-Agents.—Where one employed by defendant employed another, such other held the agent of defendant, whose knowledge of a certain rule of plaintiff would be imputed to defendant, rendering her liable for its breach.—Merritt v. Huber, Iowa, 114 N. W. Rep. 627.

124. **Public Lands**—Employee of Land Office.—Reliance in making timber culture entry on the opinion of the commissioner of the general land office that the provisions of Rev. St. U. S. sec. 452 (U. S., Comp. St. 1901, p. 257), did not affect the right of a special agent of the land office to make valid timber culture, does not prevent the government from canceling his entry.—Prosser v. Finn, U. S. S. C., 28 Sup. Ct. Rep. 225.

125. **Quieting Title**—Parties Defendant.—In a suit to remove a cloud from title, as a general rule, certain allegation held sufficient without setting out in detail the facts showing ownership.—West Coast Lumber Co. v. Griffin, Fla., 45 So. Rep. 514.

126. **Quo Warranto**—Discretion of Public Officer.—The exercise by a prosecuting attorney of his official discretion in exhibiting an information in the nature of quo warranto is evidenced by his signature to an information in due form and its exhibition in court.—State v. Taylor, Mo., 106 S. W. Rep. 1023.

127. **Railroads**—Injury to Animals on Track.—A railroad is not liable for injuries to cattle resulting from their being frightened and caused to run by the unnecessary blowing of the engine whistle, or the escaping of steam, unless the trainmen are aware of the presence of the cattle and know that injury is liable to result to them.—Gibson v. Louisville & N. R. Co., Ky., 106 S. W. Rep. 838.

128. **Replevin**—Evidence.—In an action to recover a grocery stock delivered under a contract for exchange for a lot, which defendant failed to convey to plaintiff, having previously deeded it to another, evidence held to sustain a verdict for plaintiff.—Crawford v. Hurd, Ky., 106 S. W. Rep. 849.

129. **Sales**—Acceptance of Goods by Agent.—Where a buyer selects an employee to receive the materials bought, and he accepts some which are not of the character bargained for, the buyer is bound by his acceptance, though the employee had no knowledge of the terms of the contract.—Gorham v. Dallas, C. & S. W. Ry. Co., Tex., 106 S. W. Rep. 930.

130.——Breach of Warranty.—In an action on a note for the purchase price of horses, where breach of an express warranty as to their health was set up as a defense, failure to instruct as to an implied warranty of breeding

qualities of the horses held not error.—Boylan v. McMillan, Iowa, 114 N. W. Rep. 630.

131.——Inspection of Goods.—In an action on a contract stipulating for an inspection of material sold, where the petition alleged that the material had been inspected, an allegation that the inspection had not been made was properly pleaded in defense.—Gorham v. Dallas, C. & S. W. Ry., Tex., 106 S. W. Rep. 930.

132.——Remedies of Seller.—Where a seller, on the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price and that obtained on the resale, he must resell within a reasonable time and at the best price he can reasonably obtain.—Carver, Frierson & Co. v. Graves, Tex., 106 S. W. Rep. 903.

133.——Rescission.—To effect a rescission of a sale, it is not necessary to redeliver the property to the vendor at the place where delivered by him, if he declares he will not accept redelivery.—Pitcher v. Webber, Me., 68 Atl. Rep. 593.

134. **Street Railroads**—Care Required as to Persons Using Street.—A street car company is required to exercise only that degree of care toward persons having a right to the common use of the street that a person of ordinary prudence would exercise under like circumstances.—Lexington Ry. Co. v. Woodward, Ky., 106 S. W. Rep. 853.

135.——Complaint in Personal Injury Case.—Counts in a complaint against a street railroad company for personal injuries held bad as count for wanton injury, but sufficient as counts for simple negligence, and hence open to the defense of contributory negligence.—Birmingham Ry., Light & Power Co. v. Jaffee, Ala., 45 So. Rep. 469.

136. **Supersedeas**—Quashing of Execution.—Supersedeas is the proper remedy in vacation to quash an execution on a judgment.—Ex parte Pearl Roller Mill Co., Ala., 45 So. Rep. 423.

137. **Taxation**—Illegal Levy.—A bill to enjoin a tax collector who threatens illegally to seize and sell personal property will be dismissed, unless the property is particularly valuable, and cannot be compensated adequately in damages.—H. W. Metcalf Co. v. Martin, Fla., 45 So. Rep. 463.

138. **Telegraphs and Telephones**—Mental Anguish.—A telegram held to suggest such relationship of the parties as to notify the telegraph company that the addressee would probably suffer mental anguish if it were not promptly delivered.—Western Union Telegraph Co. v. Gulledge, Ark., 106 S. W. Rep. 957.

139. **Trial**—Curative Instructions.—In libel for charging a village attorney with swearing falsely to a claim against the village for legal services, error in certain instructions held cured by subsequent instructions.—Smith v. Hubbell, Mich., 114 N. W. Rep. 865.

140.——Instructions.—The transposition of the words "plaintiff" and "defendant" in a charge held not reversible error, where the part of the charge submitting the issues to the jury was so plain that the jury could not have been misled.—Galveston, H. & S. A. Ry. Co. v. Wafer, Tex., 106 S. W. Rep. 897.

141.——Instructions Ignoring Issues.—In an action for broker's commissions an instruction ignoring the question whether plaintiff's efforts to sell the land had not been abandoned or his agency revoked before defendant and the purchaser met held erroneous.—Christian v. McDonnell, Mo., 106 S. W. Rep. 1104.

142.——Questions of Fact.—Where the court expressly declines to pass on questions of fact in litigation, it is unnecessary, after its decision so to do has been filed, to apply for amended findings covering such question.—State v. Germania Bank, Minn., 114 N. W. Rep. 651.

143. **Trover and Conversion**—Burden of Proof.—In an action by buyers to recover the value of timber converted by defendants, who claimed to have purchased it of plaintiffs' vendors, the burden is on plaintiffs to prove their prior purchase from the owners and defendants' notice thereof prior to the latter's purchase.—Johnson v. Kelley, Ky., 106 S. W. Rep. 864.

144. **Trusts**—Purchase of Property by Trustee.—A trustee may buy from the cestui que trust, and the transaction is valid where there is a fair consideration and no concealment, and the trustee takes no advantage of information acquired by him in the character of trustee.—Flowers v. Flowers, Ark., 106 S. W. Rep. 949.

145. **United States**—Claims Against.—Recital that claimant had a prior lien contained in Act May 27, 1902, c. 887, 32 Stat. 207, 243, empowering court of claims to determine claim against government on account of sale of real estate to satisfy revenue tax, held not an admission of such fact.—Blacklock v. United States, U. S. S. C., 28 Sup. Ct. Rep. 228.

146. **Vendor and Purchaser**—Breach of Executory Contract.—The measure of damages for breach by vendor of executory contract to convey real estate is the difference between the value of the land and the price contracted to be paid, and the vendee may also recover the amount advanced on the price.—Beck v. Staats, Neb., 114 N. W. Rep. 633.

147.——Vendor's Lien.—Where a vendee has possession under a valid contract, the vendor, until conveyance of title, is in equity regarded as holding the legal title as security, and equity may decree a compliance with the contract or make such decree as the facts may warrant.—McKinnon v. Johnson, Fla., 45 So. Rep. 451.

148. **Venue**—Plea of Privilege.—A plea of statutory privilege to have an action brought in the county where defendant resides is a plea in abatement, but the filing of pleas to the merits with such plea is not a waiver of the plea in abatement.—E. O. Painter Fertilizer Co. v. Du Pont, Fla., 45 So. Rep. 507.

149. **Wills**—Burden of Proof.—When subscribing witnesses testified to the due execution of the will, and that testator was of sound mind, such evidence established a prima facie case for proponents, and shifted the burden of proving incapacity or undue influence to contestants.—Holton v. Cochran, Mo., 106 S. W. Rep. 1035.

150.——Construction.—Testator's will, providing that "all my property to my wife for life except the forced portion to my father and mother," held a donation of a life usufruct.—Succession of Verneuille, La., 45 So. Rep. 520.

152.——Contests.—A court in a will contest may not direct the payment of anticipated expenses to contestant out of the funds of the estate without specific statutory authority therefor.—In re McNaughton's Will, Wis., 114 N. W. Rep. 849.

153. **Witnesses**—Impeachment.—Where state witness was asked a question on cross-examination laying the foundation for impeachment, it was error not to permit defendant to show a contradictory statement.—Adams v. State, Fla., 45 So. Rep. 494.